

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LEAH LAFERRIERE,)
Plaintiffs,) Civil Action
v.) 06-5492
ZURICH AMERICAN INSURANCE)
COMPANY,) Philadelphia, PA
Defendant.) November 18, 2008

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN J. FULLAM
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: JAMES JOSEPH WALDENBERGER, ESQUIRE
Ochroch & Graber, PC
318 South 16th Street
Philadelphia, Pennsylvania

For the Defendant: KEVAN FRANCIS HIRSCH, ESQUIRE
Kaplin Stewart Meloff Reiter &
Stein, Professional Corporation
Union Meeting Corporate Center
910 Harvest Drive, P.O. Box 3037
Blue Bell, Pennsylvania 19422-0765

Audio Operator: Milahn Hull

Transcribed by: DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-129
PHONE: (856) 435-7172
FAX: (856) 435-7124
Email: Dianadoman@Comcast.net

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I N D E X

ARGUMENT BY

Mr. Hirsch	3, 35
Mr. Waldenberger	14

1 (Call to the Order of the Court)

2 THE COURT: Good morning.

3 MR. WALDENBERGER: Good morning, Your Honor.

4 MR. HIRSCH: Good morning, Your Honor.

5 THE COURT: Be seated, please. Sorry to hold things
6 up, but a good bit of the time was spent waiting for them to
7 figure out how to lower the barriers into the courthouse.

8 They were stuck in both directions. This is argument
9 on defendant's motion for summary judgment in the Leah
10 Laferriere v. Zurich American.

11 Somebody wish to propose the motion?

12 MR. HIRSCH: Your Honor, Kevan Hirsch for defendant
13 Zurich American Insurance Company.

14 THE COURT: It's your motion, so you better start
15 talking.

16 MR. HIRSCH: I better. Okay. I believe, Your Honor,
17 that we have three issues before us that relate to the --
18 first, the plaintiff's contention of lowball settlement tactics
19 leading to liability under the Bad Faith Statute, Section 8371.

20 Secondly, we have an issue relating to what conduct,
21 in the course of an arbitration, called for under the insurance
22 contract could lead to potential liability under that Bad Faith
23 Statute.

24 And, third, we have the issue of whether or not the
25 plaintiff has to show that there is some adverse impact, some

Hirsch - Argument

Page 4

1 harm resulting from activities that are claimed to be in bad
2 faith. And if the Court please, I would address them seriatim.

3 THE COURT: Go right ahead.

4 MR. HIRSCH: With respect to the question of
5 settlement and evaluations. The case law, I believe, breaks
6 down into 3 types, which might permit liability under Section
7 8371.

8 When we have a question whether the defendant failed
9 to make a sufficient settlement offer so that a case had to go
10 to arbitration or trial.

11 They break down into three categories. One, where
12 there is no offer, like Klinger. Another where there's, if the
13 case is clearly worth the limits of liability and the insurer
14 will not offer them. And the third is where a carrier makes
15 offers below their own evaluation and tries to stick with them.

16 In other words, to effectuate a situation where the
17 plaintiff can't accept the offer, and it's clearly
18 unreasonable.

19 And I don't think we have any of those here.

20 THE COURT: Is there any obligation on the part of an
21 insurance company where the policy provides for arbitration, is
22 there any obligation to make offers to avoid arbitration?

23 MR. HIRSCH: Well we have. And I would say -- I
24 would say yes, if it's clearly a case where there is some
25 liability, such as this one. There was no liability defense,

1 so to speak. In other words, Ms. Laferriere was rear-ended and
2 there was no question under the policy that she was an insured
3 and so on.

4 THE COURT: Therefore, it's not your position, I take
5 it, that all the insurance company has to do, since there is a
6 provision for arbitration, is say to the client, okay, pursue
7 your remedies and we'll pay whatever the arbitrators award.

8 You have to make an offer of some kind.

9 MR. HIRSCH: Yes.

10 THE COURT: Okay.

11 MR. HIRSCH: We agree with that proposition. That
12 there is a good faith duty to try to resolve the claim.

13 THE COURT: Okay. What did you offer?

14 MR. HIRSCH: The last offer that was made by Zurich
15 was \$125,000. It was first \$100,000, then \$125,000. And that
16 was exclusive of the \$50,000 that Leah Laferriere received from
17 the tortfeasor of 50,000, so that represented offers in the
18 total amount of compensation for her, 150 to \$175,000.

19 THE COURT: Okay. So you think you did all right?

20 MR. HIRSCH: Well we made a good faith effort. And I
21 would look at some of the other evidence here beyond mere 20/20
22 hindsight looking at the award. But I would look at some other
23 evidence, such as the evaluation of the case from the
24 plaintiff's perspective by her UIM counsel.

25 Mr. Goldberg testified that, in his view, that a

1 range of settlement for this case should have been from
2 \$185,000 to \$225,000.

3 And there were reasons why the parties -- that
4 counsel differed. They had differences as to venue, they had
5 differences as to the admissibility of evidence, such as a
6 medical lien. There were bases for these conclusions that were
7 made by counsel for Zurich, and the arguments that were made by
8 counsel for Ms. Laferriere.

9 But the one factor that seems to escape my opponents
10 here is that, in order to have a reasonable basis for your
11 activities, you do not have to be right.

12 THE COURT: Well so you should prevail on the first
13 point, you made adequate offers. What do you -- how do you
14 handle the second point?

15 MR. HIRSCH: The second point, Your Honor, involves
16 after -- I think it is important to recognize that, from a
17 temporal standpoint, after the settlement negotiations were
18 concluded, and both sides had pretty much, you know, they've
19 come to an impasse. Ms. Laferriere would not lower her demand
20 below \$375,000.

21 Zurich did not think that was reasonable. As her own
22 counsel testified and she testified, they felt that they should
23 take their chances at arbitration. So now we move into the
24 realm of, what conduct in the course of an arbitration by
25 counsel should be considered to be within the realm of the Bad

1 Faith Statute.

2 And I think that we must consider, first and
3 foremost, that in the rather recent cases of Condio and
4 Zappile, which are discussed at length in the parties' briefs,
5 the Pennsylvania Superior Court has expressly recognized that
6 UIM arbitrations and UIM cases are now recognized as inherently
7 adversarial.

8 And while a duty of good faith remains between the
9 insured and insured -- the insurer, we must recognize up front
10 that this is akin to litigation.

11 Indeed now --

12 THE COURT: Right but --

13 MR. HIRSCH: -- we're not -- we have litigation.

14 THE COURT: Does that mean that you can direct your
15 own medical expert to refuse to provide any information?

16 MR. HIRSCH: Well I believe that he must consent.
17 The testimony was that, we preferred that he did not. There
18 was never a threat. Dr. Grossinger testified it was a cordial
19 conversation. There was no suggestion, other than, we would
20 prefer it if you, as a testifying expert for our side, did not
21 consent to the use of your report.

22 THE COURT: In effect, you said, please don't help
23 the other side.

24 MR. HIRSCH: We did that in the context of an
25 arbitration proceeding where the Rules of Evidence applied.

Hirsch - Argument

Page 8

1 THE COURT: And then the arbitration proceeding --
2 and you also tried to keep his report out, right?

3 MR. HIRSCH: We --

4 THE COURT: You tried to keep out of evidence his
5 report.

6 MR. HIRSCH: The initial objection was to the
7 plaintiff's use of Dr. Grossinger's report. Yes.

8 THE COURT: What was the basis?

9 MR. HIRSCH: And then the objection was made to the
10 panel of arbitrators.

11 THE COURT: What was the basis for the objection?

12 MR. HIRSCH: That, in effect, one would be compelling
13 the testimony from an expert witness -- compelling a witness to
14 give opinion testimony.

15 Which ordinarily one cannot do. It's sort of like
16 taking the deposition of the doctor in the malpractice case and
17 trying to get him to state his opinions. Akin to that.

18 The objection was raised, the arbitration panel
19 agreed that consent would have to be given and --

20 THE COURT: Consent by whom?

21 MR. HIRSCH: Consent by Dr. Grossinger.

22 THE COURT: Well, of course.

23 MR. HIRSCH: And that, after the hearing, Mr. Meehan,
24 counsel for Zurich, called Dr. Grossinger and spoke to him
25 about it. After the hearing, Mr. Goldberg called Dr.

Hirsch - Argument

Page 9

1 Grossinger and spoke to him about it.

2 And Dr. Grossinger made the decision that he was not
3 going to consent. At the same hearing --

4 THE COURT: Did he testify before the arbitrators on
5 your behalf?

6 MR. HIRSCH: He did not. His opinion was ultimately
7 not admitted into evidence. However, I would point out to the
8 Court that, during the course of this argument to the
9 arbitrators, Mr. Goldberg was given the opportunity, and
10 testified that he did tell the arbitrators exactly what the
11 report said.

12 And he was also --

13 THE COURT: Therefore, what? What's that got to do
14 with anything?

15 MR. HIRSCH: Well it's got to do with the fact that
16 what happened here did not result in any harm to the
17 plaintiff's case.

18 THE COURT: You mean, the arbitrators would regard as
19 evidence what the lawyer said that some witness had said?

20 MR. HIRSCH: Not exactly. But Mr. Goldberg testified
21 that he thought that was a terrific advantage for him, and
22 that, indeed, in making a motion to exclude all testimony
23 relating to the shoulder injury, that Mr. Meehan made a huge
24 strategic mistake.

25 He had argued both of those together. Sort of like

Hirsch - Argument

Page 10

1 you're making them -- you're --

2 THE COURT: In other words, so that your obstructive
3 tactics actually helped the plaintiff?

4 MR. HIRSCH: Well I would not call them obstructive,
5 Your Honor, I would call them in accordance with the Rules of
6 Evidence --

7 THE COURT: That's how they characterize --

8 MR. HIRSCH: -- and the arbitrators make a decision.

9 THE COURT: -- that's how they would characterize
10 them, I'm assuming.

11 MR. HIRSCH: I would. I would agree that they're
12 going to characterize them as obstructive. But I would like,
13 then, to return, if we might --

14 THE COURT: You're so used to suggesting that what
15 they call obstructive tactics, if they're right that they are
16 obstructive tactics, that because they backfired, there was no
17 harm.

18 MR. HIRSCH: Well what I'm suggesting is that
19 ultimately, however you characterize these activities, I would
20 prefer that they be characterized as an aggressive defense in
21 an arbitration proceeding, in accordance with the Rules of
22 Evidence. No one's concealing everything. The arbitrators are
23 presented with argument, and they make a decision.

24 At the same time, Mr. Goldberg was permitted to go --
25 or thought he was -- had leave to go to his own doctor and fill

1 the hole in his case. And he does not dispute the fact that
2 there was a hole in his case, because he did not have a doctor
3 to say, with a reasonable degree of medical certainty, that Ms.
4 Laferriere's shoulder injury was caused by the accident. And
5 then he subsequently obtained such an opinion, and it was
6 ultimately admitted before the arbitrators.

7 But when we proceed along this path about evidence
8 before -- who can make the evidentiary arguments, and whether
9 those would be characterized as obstructive, or not, do we not
10 start down the path of reexamining every decision made in this
11 type of proceeding on evidence and arguments that are made,
12 statements that are made by advocates in part of a tribunal
13 that's making the decision.

14 I think that a case that was decided before Condio
15 and Zappile by the Third Circuit has some relevance here.
16 Although it was not cited by the parties in their briefs. And
17 that would be West Virginia Realty v. Northern Insurance, a
18 2003 case, in which the Third Circuit spoke of the question,
19 whether conduct during litigation should be considered within
20 the Bad Faith Statute.

21 Now in that case we had to -- had to do with the
22 discovery violation and so on. But what the Third Circuit had
23 to say on litigation conduct was, under its analysis of the
24 case law, what we're -- the cases where bad faith claims were
25 permitted to proceed where the conduct is after litigation has

Hirsch - Argument

Page 12

1 ensued.

2 All those cases involved, and I quote "Something
3 beyond a discovery violation suggesting that the conduct was
4 intended to evade the insurers' obligations under the
5 contract."

6 And the insurers' obligations --

7 THE COURT: And you're citing that language in
8 support of your position?

9 MR. HIRSCH: Because the insurers obligations here
10 are to either pay -- they are to pay what the insured is
11 legally entitled to recover as compensatory damages.

12 And if we cannot agree on the amount, then you go to
13 arbitration. And the arbitration provisions are to be, it's
14 conducted in accordance with the Uniformed Arbitration Act, and
15 local rules of law as to arbitration procedure and evidence
16 will apply.

17 So what we are arguing about is, under the Rules of
18 Procedure and Evidence, is the defendant entitled to object to,
19 first, the use of the report, second, to supplemental medical
20 reports. That's all being decided by arbitrators.

21 And now that that's all decided and the plaintiff has
22 received her result, which everyone thought was terrific, we
23 are now back here to reexamine whether or not Zurich had a
24 right to aggressively defend itself under the arbitration
25 provisions of this contract.

1 And, indeed, nowadays, a UIM case can go to Court.
2 In 2005, the Supreme Court of Pennsylvania decided that the
3 insurance commissioner could not mandate arbitration any
4 longer. So now we're going to have cases in UIM -- for UIM
5 benefits that may actually go to Court.

6 So are we then going to go to reexamining everything
7 that happens in a trial later, because we got a large verdict
8 in the trial?

9 THE COURT: Certainly.

10 MR. HIRSCH: Or the whole pretrial procedure? I
11 think it's akin to what Judge Waldman had to say in the Slater
12 v. Liberty Mutual case.

13 THE COURT: What did he have to say?

14 MR. HIRSCH: Where he said -- pardon me?

15 THE COURT: What did he have to say?

16 MR. HIRSCH: What he said was, and I quote.

17 "Section 8371 provides a remedy for bad faith conduct
18 by an insurer, in its capacity as an insurer. And not as a
19 legal adversary in a lawsuit filed against it by an insured.
20 The Court's confident that the legislature did not contemplate
21 a potentially endless cycle of Section 8371 suits, each based
22 on alleged discovery abuses by the insurer in defending itself
23 in the prior suit."

24 Now the issue before Judge Waldman was a discovery
25 issue, again. But here we have substantive objections to

Waldenberger - Argument

Page 14

1 evidence of procedure made, and an attempt to create from that
2 -- from those arguments and those motions made before the
3 arbitrators, a bad faith case.

4 THE COURT: So you think you should get summary
5 judgement?

6 MR. HIRSCH: I do, Your Honor.

7 THE COURT: All right. Let's hear if the other side
8 agrees.

9 MR. WALDENBERGER: Good morning, Your Honor. Jim
10 Waldenberger for Leah Laferriere. I'm here with my co-counsel
11 Jonathan Cohen.

12 MR. COHEN: Good morning, Your Honor.

13 MR. WALDENBERGER: And, no, Your Honor, we do not
14 agree that summary judgment is appropriate. Your Honor, you
15 listened to Mr. Hirsch for approximately 25 minutes. And I
16 think what's telling there -- that was by my estimation --

17 THE COURT: It's actually 18 minutes.

18 MR. WALDENBERGER: Eighteen minutes. What's telling
19 there is that there wasn't one mention of a claim note, or
20 statements of any of the Zurich representatives. And that's
21 really what this case is about.

22 This case is about the evaluation of Leah
23 Laferriere's claim. As Your Honor is surely aware, Section
24 8371 the Bad Faith Statute was put in place to prevent
25 insurance companies from being deceitful, or overbearing, or

1 taking advantage of people.

2 And what's important in this case is to understand
3 and appreciate the philosophy that is taken by Zurich, and
4 their approach to claims handling here.

5 Now there are a few statements that I'll explain
6 later, but I think are important, that are illustrative of what
7 the Zurich representatives, that includes Zurich's UIM counsel,
8 and how they handled the case.

9 Here's one. "Ortho IME was silent on causation,
10 which was fine with us." That's one statement.

11 Another one. "Unfortunately, Grossinger also wades
12 in on additional future care." Unfortunately. "We should have
13 the neuro exam and report within 30 days. That would put us
14 closer to the December holidays, which may be beneficial to
15 settlement negotiations."

16 And Your Honor my favorite is, "Use the IME as
17 leverage and argue lack of relationship with shoulder."

18 Statements like that by the Zurich representatives
19 are not indicative of bad faith. What they show is a
20 philosophy, a mind set to find a reason not to pay the case,
21 and to lowball the case.

22 THE COURT: Well they have an obligation to their
23 shareholders as well as to their insurers.

24 MR. WALDENBERGER: Your Honor, correct, that is
25 correct. And the Court in Condio held precisely that.

1 However, that's not the issue here. What's interesting and
2 what's important about the Condio case, is Condio does
3 recognize that an un and under insured motorists case, when they
4 go to arbitration, there is a degree of an adversarial nature.

5 However, what the Condio court specifically says is
6 that the duty of good faith and fair dealing exists,
7 nonetheless.

8 It's just that the insurer doesn't have to sacrifice
9 its own interests --

10 THE COURT: Right.

11 MR. WALDENBERGER: -- in favor of that of its insured.
12 Well in this case, Zurich was sacrificing Leah Laferriere's
13 interest. And how that happened, Your Honor --

14 THE COURT: In what respect? What did they do to
15 sacrifice her interest?

16 MR. WALDENBERGER: They performed an unreasonable
17 evaluation and investigation in the case. And how that
18 happened was that there was zero evaluation of her shoulder
19 injury when it came to determining the value of her claim.

20 For example, probably the most telling evidence is
21 exhibit 1 to plaintiff's -- to our response to motion for
22 summary judgment, where in March of -- March 19th, 2004 Mark
23 Allard, who was the -- Your Honor, do you want me to stop while
24 you look at that?

25 THE COURT: No, that's okay.

1 MR. WALDENBERGER: Okay.

2 THE COURT: I'm listening intently.

3 MR. WALDENBERGER: In March of 2004, that is when
4 authority for \$150,000 settlement was granted.

5 Now as you'll see in my brief, Mr. Allard testified
6 -- or Mr. Steinbock testified, that was the Zurich
7 representative, that, if he considered the shoulder, the case
8 is worth \$225,000.

9 So let's do the math. A hundred and fifty thousand
10 was what they reserved it for and granted authority for. If
11 the shoulder's related, it's worth 225. But they never offered
12 more than 125.

13 But more importantly than that, Your Honor, the day,
14 or I should -- I'm sorry to say that two weeks after the
15 \$150,000 authority was granted to settle the case, Steinbock,
16 in exhibit 1, writes, "I have advised him that I would use the
17 IME as leverage and argue lack of relationship of the shoulder
18 in negotiations."

19 So what does that tell you? It tells you that
20 they're not consider --

21 THE COURT: Well, frankly, it doesn't tell me
22 anything. Because the print is so small you can't read what
23 the heck it says.

24 MR. WALDENBERGER: Understood, Your Honor. But for
25 the record, I'm able to read it, and what the note says, is

1 that -- and actually under the middle note, March 19, 2004,
2 author, Ira Steinbock, category MCU, third paragraph.

3 "I have advised him that I would use the IME as
4 leverage and argue the lack of relationship of the shoulder in
5 negotiations."

6 And that is direct evidence that Zurich never
7 considered the shoulder, was never going to consider the
8 shoulder, and that statement doesn't stand alone.

9 THE COURT: Well you didn't finish the reading. I'm
10 getting better at looking at it.

11 "The demand is 400k, there is only 3k in lost wages,
12 and all meds have been paid."

13 MR. WALDENBERGER: Yes. And, Your Honor, for our
14 purposes, the remainder of that note does not subtract from the
15 fact that Zurich obviously was not evaluating or considering
16 the shoulder in the evaluation of the case.

17 THE COURT: Right.

18 MR. WALDENBERGER: Which is further supported by the
19 third party administrator with Sedgwick, who was handling part
20 of the administration of the claim here. Their representative,
21 Mark Allard, testified on page 40 of his deposition that the
22 shoulder was not related.

23 When I took the deposition of Zurich's Ira Steinbock,
24 and I asked him, was the shoulder related? Three highly,
25 highly, highly doubtful that the shoulder was related.

1 He also mentioned that Dr. Grossinger, the doctor
2 that Zurich hired to examine Ms. Laferriere, testified, or put
3 in his report that the shoulder was related, but his opinion
4 was, "discount it heavily," as Mr. Steinbock says on page 125
5 of his deposition.

6 Then Mr. Meehan, Zurich's UIM counsel, when I asked
7 him about, was the shoulder related? What did you think about
8 the shoulder? He mentioned, well we -- we just disregarded Dr.
9 Grossinger's opinion. And why, Your Honor, that disregard of
10 the shoulder is unreasonable and lacked a reasonable basis, is
11 because all the evidence in the case showed that the shoulder
12 was related.

13 The accident was in December of 2000. In -- two
14 weeks later, on December 28th, Leah goes to her family doctor
15 and she complains of shoulder stiffness. She goes to
16 rehabilitation, and the rehab records, and all of this outlined
17 in the brief, between January 3rd 2001 and January 12th, 2001,
18 there's five complaints relating to the shoulder.

19 Putting aside the evidence that was already in the
20 file, the medical records showing the connection to the
21 shoulder, the connection to the shoulder to the car accident,
22 let's now discuss what Zurich found out while they were
23 investigating the case.

24 They sent Leah for an orthopedic IME in August of
25 2004 to see Dr. Bosacco.

1 Dr. Bosacco writes his report, there isn't a word in
2 there that says that the shoulder injuries aren't related to
3 the accident.

4 And Mr. Meehan --

5 THE COURT: Well does he say the shoulder injuries
6 are related to the accident? Or he just doesn't discuss that
7 issue?

8 MR. WALDENBERGER: Doesn't discuss the issue.

9 THE COURT: Thank you.

10 MR. WALDENBERGER: And when Mr. Meehan, in his e-mail
11 to the Zurich representatives, which is at exhibit 6 to
12 plaintiff's response, and, again, apologizing for the small
13 writing, but what he puts in an e-mail.

14 "The Ortho IME, that's Dr. Bosacco, was silent on the
15 causation issue, which was fine with us." Which was fine with
16 us.

17 The next thing that Zurich learned, Your Honor, was
18 when they sent Leah --

19 THE COURT: Well, you mean, if they expressed
20 happiness at something that helps their cause, that's a sign of
21 bad faith?

22 MR. WALDENBERGER: Yes.

23 THE COURT: Oh.

24 MR. WALDENBERGER: Because their cause, Your Honor,
25 is to serve -- their cause is --

Waldenberger - Argument

Page 21

1 THE COURT: No, their -- their cause is not to give
2 you more than you're entitled to.

3 MR. WALDENBERGER: Agreed, Your Honor. I will not
4 stand here and tell you that the insurance company has to
5 accept everything that the insured says is facts without --
6 without performing an investigation.

7 THE COURT: Okay. What -- how were you damaged by
8 the insurance company's conduct? What damages did you suffer?

9 MR. WALDENBERGER: Your Honor, under law of
10 Pennsylvania, no proof of damages necessary. I can present and
11 have calculated lost interest on the amount of the award, if
12 Zurich would have paid us earlier.

13 THE COURT: So that, in your -- if the motion for
14 summary judgment is denied, and the case goes to the jury, and
15 the jury simply says, yes, there was bad faith, period. They
16 don't award damages?

17 MR. WALDENBERGER: Correct, Your Honor.

18 Bad faith --

19 THE COURT: What's the point of suing?

20 MR. WALDENBERGER: Bad faith is a remedial statute.
21 And --

22 THE COURT: Remedial. What remedy do you want,
23 that's what I'm trying to find out?

24 MR. WALDENBERGER: Punitive damages and attorney's
25 fees as --

Waldenberger - Argument

Page 22

1 THE COURT: Attorney's fees, for what?

2 MR. WALDENBERGER: Attorney's fees for pursuing the
3 bad faith case, Your Honor. Pursuant to the Willow Inn case,
4 which is a Third Circuit case.

5 THE COURT: And what kind of punitive damages do you
6 think you're entitled to?

7 MR. WALDENBERGER: Punitive damages for -- Your
8 Honor, I'm not exactly sure but -- what you're asking. But --

9 THE COURT: I'm trying to find out why we're
10 bothering with this case, if you don't know what you want.

11 MR. WALDENBERGER: Your Honor, we want punitive
12 damages.

13 THE COURT: Well how much?

14 MR. WALDENBERGER: How much in punitive --

15 THE COURT: What do you think you're entitled to?

16 MR. WALDENBERGER: Your Honor, frankly, that's for
17 the jury to decide the amount of the punitive damages. And the
18 issue here is that, the insurance company, Zurich, acted in bad
19 faith. And pursuant to Section 8371, when an insurer acts in
20 bad faith, it is liable for punitive damages.

21 There is no requirement under the law that harm be
22 proven. There's no Supreme Court -- Pennsylvania Supreme Court
23 case that holds that. There's no Pennsylvania Superior Court
24 case that holds that. There's no Third Circuit case that holds
25 that.

Waldenberger - Argument

Page 23

1 And as a matter of fact, the Court in Birth Center,
2 the Pennsylvania Superior Court noted that, the Bad Faith
3 Statute is a remedial statute.

4 And that --

5 THE COURT: Of course it's remedial, all statutes are
6 remedial. But I don't know what you're remedy is. I'm trying
7 to find out.

8 MR. WALDENBERGER: The remedy, Your Honor, is that
9 when an insurer acts in bad faith, the insurer is liable for
10 punitive damages.

11 THE COURT: You want somebody to pull figures out of
12 the air as to what the punitive damages should be. Who does
13 the pulling out of the air?

14 MR. WALDENBERGER: The jury, Your Honor. The jury
15 determine what the value of the bad faith is. And the
16 purpose --

17 THE COURT: They could award anywhere from fifty
18 cents to a million dollars.

19 MR. WALDENBERGER: That's within the province of the
20 jury, Your Honor, that is correct.

21 THE COURT: What -- what guideposts would they be
22 given, how would they be charged on the subject?

23 MR. WALDENBERGER: Well what's, Your Honor, important
24 to remember --

25 THE COURT: Your colleague wants you to read what

1 he's prompting you with.

2 MR. WALDENBERGER: I've seen that. What is important
3 to remember is that, deterrence is the issue. And an insurance
4 company like Zurich, in a situation like this, cannot hamper
5 witnesses. They cannot and should not contact their own IME
6 physician, who provides a favorable report, and when the
7 arbitration panel gives the UIM lawyer, the insurance lawyer
8 says -- one thing that Mr. Hirsch said was that the arbitration
9 panel agreed with Zurich's position, and that Leah Laferriere's
10 counsel could go seek Mr. Grossinger's consent.

11 That's not correct. The arbitration panel didn't
12 agree with Zurich at all. As a matter of fact, what actually
13 happened was that, as Mr. Meehan, Zurich's UIM counsel
14 testified:

15 "Unfortunately, the neutral arbitrator did not act on
16 the objection. The panel decided that Mr. Goldberg should be
17 afforded additional time to determine if Dr. Grossinger would
18 consent to the use of the report."

19 So what did Mr. Meehan do, when he walked out of that
20 arbitration hearing? He picked up the phone and he called Dr.
21 Grossinger, and Dr. Grossinger said he was told that, we prefer
22 that you not provide your consent and cooperation.

23 And Dr. Grossinger, as he testified, took that as
24 being advised not to cooperate.

25 Your Honor, that is the type of conduct that needs to

1 be deterred, because Dr. Grossinger's report -- now Mr. Hirsch
2 goes a lot into the, this is litigation, almost like this is
3 gamesmanship.

4 Your Honor, this is not gamesmanship. This not
5 litigation. This is an insurance company that has an
6 obligation to evaluate Leah Laferriere's claim fairly and
7 objectively. And it is not fair, and it is not objective when
8 insurance company's own doctor provides an opinion on
9 causation, and the insurance company does everything within its
10 power, including contacting the doctor and telling him not to
11 cooperate, after the arbitration panel give the UIM plaintiffs
12 lawyer permission to do so.

13 That is the type of conduct that needs to be
14 deterred. That is the type of conduct that warrants punitive
15 damages. And that's the type of conduct that the jury needs to
16 hear to understand what the value of the case is, and why
17 conduct like Zurich's conduct cannot be condoned and cannot be
18 repeated.

19 THE COURT: You opponent says that you have three
20 issues you have to prove. And one of them is that the
21 plaintiff was harmed by what the insurance company did. You
22 disagree.

23 MR. WALDENBERGER: I disagree, Your Honor. And what
24 I would -- I disagree on the law. The law does not require
25 that. Under bad faith, the plaintiff has to prove two things.

Waldenberger - Argument

Page 26

1 Insurance company acts without reasonable basis and it had a
2 reckless disregard for its lack of reasonable basis.

3 There have been opportunities for the courts to
4 address that issue. And in Terletsky, the PA Superior Court,
5 Zimmerman, PA Superior Court, Birth Center, Pennsylvania
6 Supreme Court, Klinger Third Circuit, none have ever added this
7 additional element of requiring harm.

8 And, Your Honor, if --

9 THE COURT: Have they expressly said that the
10 plaintiff doesn't have to show harm?

11 MR. WALDENBERGER: No. They have not. However, Your
12 Honor, what is instructive is that you take Hollock v. Erie,
13 which is the largest UIM bad faith verdict in Pennsylvania, 2.8
14 million dollars in punitive damages. The arb award was paid in
15 that case. We have Bonenberger, 275 -- Bonenberger v.
16 Nationwide, PA Superior Court, 275 in punitive damages.

17 That's an arb award in plaintiff's favor, too. The
18 Klinger case, \$300,000 in punitive damages.

19 THE COURT: That argument is meaningless, since I
20 don't know what any of those -- what the fact of any of those
21 cases were and you don't either, apparently.

22 MR. WALDENBERGER: Your Honor, I do know the facts of
23 the cases. The most important fact with all those cases, is
24 that the plaintiff alleged bad faith in connection with the
25 handling of the UIM case. And at the end of the day, the

1 arbitration award came in, and that in all of those cases
2 the plaintiff --

3 THE COURT: Oh, well these are arbitrator's awards.

4 MR. WALDENBERGER: I'm sorry, Your Honor.

5 THE COURT: The arbitration award came in bigger than
6 what they offered, right?

7 MR. WALDENBERGER: Correct. Yes.

8 THE COURT: How much bigger?

9 MR. WALDENBERGER: The specific facts of each of the
10 individual cases regarding the numbers, Your Honor, I do not
11 know. But the fact for which these cases are important here,
12 and this analysis, is that those cases did not say that
13 plaintiff wasn't harmed, there's no bad faith.

14 In that respect, these cases are very similar to the
15 present case, where we have an arbitration award. If the rule
16 was that plaintiff needs to prove harm, and harm means some
17 element of financial loss, in any case when an insured goes
18 through an arbitration process and receives an award, there'd
19 be no potential bad faith.

20 And if that were the case, Your Honor, an insurance
21 company would never have the incentive to ever pay cases,
22 unless the arbitration award -- unless there's an arbitration
23 compelling them to do so.

24 And that is not the intention of the law. It's not
25 the intention of the statute. Specifically, the statute itself

Waldenberger - Argument

Page 28

1 doesn't even provide an element for compensatory damages.

2 Under 8371, if bad faith is proven, the plaintiff is entitled
3 to punitive damages, attorney's fees, and interest.

4 There is no --

5 THE COURT: Interest on what?

6 MR. WALDENBERGER: Interest on the amount of the
7 award and I believe it's --

8 THE COURT: For what period? In other words, first
9 of all, in this case, did the arbitrators award any prejudgment
10 interest, or not?

11 MR. WALDENBERGER: No, Your Honor. However, what we
12 have --

13 THE COURT: And what is the time period between when
14 you got the 50,000, and made your UIM demand, and the time of
15 the arbitrators' hearing?

16 MR. WALDENBERGER: The UIM demand was in February of
17 2004. The arbitration hearing was in October of 2005. What I
18 have prepared was actually a much more conservative estimate
19 than that, Your Honor.

20 And with Your Honor's permission, I will hand this
21 up. I've already provided a copy to Mr. Hirsch this morning.
22 May I approach, Your Honor?

23 THE COURT: Of course. As long as it doesn't explode
24 when it gets here.

25 MR. WALDENBERGER: Your Honor, what that document

Waldenberger - Argument

Page 29

1 represents -- again, Your Honor, this is an alternative
2 argument. My argument, number one, is harm is not required.
3 It's not required under the law, it's not required under the
4 statute.

5 However, if there is some element of harm required,
6 what this document shows is that I asked what type of interest
7 somebody would lose between January 4, 2005 and October 28,
8 2005. And I'll give you the significance of those dates.

9 January 4, 2005 is the day that Zurich received Dr.
10 Grossinger's report relating the shoulder injury and all the
11 other injuries to the incident. So I would think, at the
12 earliest possible time -- or I'd say the latest possible time,
13 Zurich was on notice as of January 4, 2005, when its own doctor
14 told them she was hurt, that this is a case that should have
15 been paid.

16 THE COURT: Well just where did you get the \$318,000
17 principal amount?

18 MR. WALDENBERGER: \$318,000 was the amount of the
19 arbitration -- arbitrators' award, after the deduction of the
20 50,000 for the third party driver.

21 THE COURT: What was your demand before -- your final
22 demand before arbitration?

23 MR. WALDENBERGER: \$375,000. So what this document
24 shows, Your Honor --

25 THE COURT: No, your 375 included the 50 you already

1 got, or is this what you wanted over and above the 50?

2 MR. WALDENBERGER: Additional.

3 THE COURT: So you valued the case at over \$400,000.

4 MR. WALDENBERGER: Total, if you add in the UIM money
5 and the third party money, yes, Your Honor. You are correct.

6 THE COURT: Thank you.

7 MR. WALDENBERGER: And what this document shows is
8 that, if Zurich would have paid the net value of the arb award
9 when they learned of -- when they had Dr. Grossinger's report,
10 if you -- if the loss is based on investment and equities,
11 you're looking at \$21,000 in a loss of interest.

12 If it's loss based on bond and money market fund
13 investment, you're looking at \$9,234. Now, Your Honor, if harm
14 is required, if Your Honor feels, or holds that harm is
15 required, that is the harm that we can present.

16 But I can't emphasize enough that the law of
17 Pennsylvania is that no such harm is required. And if harm
18 were required in bad faith cases, insurance companies would be
19 able to engage in lowball tactics and delay and never pay.

20 THE COURT: Well now, just as a matter of curiosity.
21 My understanding, perhaps improper, is that in calculating
22 prejudgment interest or delay damages, you apply a set rate, do
23 you not?

24 MR. WALDENBERGER: That is correct, Your Honor, but
25 that is not the figures we're referring to here. That's a

1 different analysis. What this number represents was that, if
2 Zurich paid the \$318,000 when it should have paid it, that
3 money could have been in Leah Laferriere's back account and
4 then used in one of these two particular modes, and would have
5 netted --

6 THE COURT: Sure.

7 MR. WALDENBERGER: -- would have created the interest
8 that we see here.

9 THE COURT: You wouldn't be making that argument if
10 the time period were a little later, though, would you?

11 Okay.

12 MR. WALDENBERGER: So, Your Honor, moving from the
13 harm issue, if Your Honor is content that that issue is -- you
14 don't need to hear anything else on that.

15 THE COURT: Right.

16 MR. WALDENBERGER: What --

17 MR. HIRSCH: From me, Your Honor?

18 THE COURT: Oh, possibly.

19 MR. WALDENBERGER: Going back to --

20 THE COURT: Basically, I'm trying to find out what
21 you guys are fighting about, whether it's worth the effort and,
22 I don't think it is, frankly.

23 MR. WALDENBERGER: Going back to the lack of
24 reasonable basis, Your Honor, and not having -- and not
25 evaluating the shoulder, what's important to know is, that

1 Zurich never had an opinion, medical opinion, refuting the
2 relationship of the shoulder, until October 20, 2005, which was
3 one week before the arbitration hearing.

4 This UIM case was opened on February 4, 2004. And
5 between that time and the time of the arbitration, a year and a
6 half later, the only evidence that Zurich ever had was that
7 that shoulder was related to the accident.

8 THE COURT: And a week before the hearing, they got
9 some evidence that confirmed that, or disagreed with it?

10 MR. WALDENBERGER: A week before the arbitration
11 hearing they got a report from Dr. Bosacco, who was silent on
12 the issue before. And his new report says that, she likely did
13 not have a shoulder injury related to the accident, because the
14 treatment records don't show an injury to the shoulder being
15 treated for after the accident.

16 Well why that is outrageous, Your Honor, is, number
17 one, the evidence that I related to you earlier regarding the
18 December and January medical records notes that showed she did
19 treatment on the shoulder.

20 Apparently Dr. Bosacco ignored that. But what is
21 particularly interesting, is that that same mistake that Dr.
22 Bosacco says in October of 2005, that there's no complaints of
23 shoulder until May of 2001, that same mistake was made by Mr.
24 Meehan in filing a motion in limine presenting it to the
25 arbitration panel, where he says that there were no treatment

Waldenberger - Argument

Page 33

1 notes before May of 2001.

2 THE COURT: So you should be suing Dr. Bosacco and
3 Mr. Meehan for bad faith.

4 MR. WALDENBERGER: Your Honor, Mr. Meehan -- Zurich
5 is responsible for Mr. Meehan's conduct. Mr. Meehan was
6 Zurich's representative, in this case. Mr. Meehan was acting
7 on behalf of Zurich in this case, and the Klinger case
8 specifically holds that an insurance company can be responsible
9 for the acts taken by its lawyer handling a UIM case.

10 Which leads me to my next point. And that is, Mr.
11 Hirsch went to great lengths to cite cases to you about how
12 litigation conduct is not bad faith.

13 What the common most distinguishing characteristic of
14 all of those cases, Your Honor, Mr. Hirsch specifically noted
15 the Slater case. But there's the Slater case he cites, the
16 O'Donnell case, International Surplus Lines out of Wyoming, and
17 the Sims case out of Oklahoma.

18 What's the same about all those cases, is that the
19 discovery conduct in litigation -- the litigation conduct
20 that's at issue is the bad faith litigation conduct. That
21 would be the same as if I was alleging that Mr. -- which I'm
22 not, if I was alleging Mr. Hirsch was engaging in some improper
23 acts, and I was trying to say that Zurich is responsible for
24 Mr. Hirsch's conduct. And I'm not saying that.

25 And we're not saying that in this case. We're saying

1 that the conduct of Mr. Meehan, as Zurich's representative in
2 the under insured motorist proceeding, or under insured
3 motorist claims handling, was unreasonable and was in bad
4 faith.

5 He, along with Mr. Allard and Mr. Steinbock, did not
6 consider the shoulder. And they recklessly disregarded the
7 fact that they didn't have any basis for the shoulder.

8 THE COURT: Who were the arbitrators? Do you
9 remember? Does anybody know?

10 MR. WALDENBERGER: Yes. Plaintiff's arbitrator was
11 Michael Murphy. The neutral arbitrator was, I believe George
12 Noel and the --

13 MR. HIRSCH: That was our arbitrator.

14 MR. WALDENBERGER: Zurich's arbitrator was George
15 Noel. And the neutral was Gerald Montella.

16 MR. HIRSCH: Right. All three Delaware County
17 lawyers.

18 MR. WALDENBERGER: Your Honor, Zurich had the
19 information all along to know that the shoulder injury was
20 related to the accident. It was in the medical records. Their
21 own doctor told them it was related. And rather than do the
22 fair thing and the honest thing, and that is consider all of
23 that evidence and their own doctor's opinion, and properly
24 evaluate the case, which, incidentally, they internally valued
25 at 225, \$225,000, again, but then never even offered that much,

1 was that, to do the fair thing would have been to consider all
2 of that evidence and pay this claim appropriately. Make
3 appropriate offers. And that's not what they did.

4 What they did is, they took every measure possible to
5 prevent Dr. Grossinger's opinion from being known by the UIM
6 counsel, from having it considered by the arbitration panel,
7 and for having his report known and fully appreciated and
8 understood by those individuals who have to consider the value
9 of the case.

10 You add onto that the fact that they did not have
11 support for their conclusions that the shoulder was not related
12 until a year and a half later, one week before the arbitration
13 proceeding, is nothing short than bad faith. And, at the very
14 least, there's a genuine issue of fact that warrants the jury's
15 consideration as to whether or not Zurich acted reasonably and
16 appropriately in this case.

17 THE COURT: Thank you.

18 MR. WALDENBERGER: Thank you.

19 THE COURT: You're persuaded, I assume?

20 MR. HIRSCH: Well, Your Honor, what I heard was not
21 evidence that was so clear, direct, weighty and convincing as
22 to enable a clear conviction without hesitation about whether
23 or not the insurer acted in bad faith.

24 THE COURT: Well who says you can't hesitate?

25 MR. HIRSCH: The Third Circuit in J.C. Penny Life

1 Insurance Company v. Pilosi.

2 THE COURT: What was the issue there?

3 MR. HIRSCH: Pardon me?

4 THE COURT: What was the issue there?

5 MR. HIRSCH: The issue was that they were -- that
6 particular comment is directed to summary judgment on bad faith
7 claims. And the fact that you must consider the burden of
8 proof that the plaintiff has at trial in considering a motion
9 for summary judgment.

10 THE COURT: Who wrote the opinion?

11 MR. HIRSCH: Judge Rosen, fourth panel of McKee,
12 Rosen and Weiss.

13 THE COURT: Judge Rosen?

14 MR. HIRSCH: Yes.

15 THE COURT: Max Rosen?

16 MR. HIRSCH: Yes.

17 THE COURT: That was a long time ago, then.

18 MR. HIRSCH: 2004.

19 THE COURT: That's a long time ago.

20 MR. HIRSCH: Now, if I might, we focused for some
21 time upon little bits and snippets of evidence that were read
22 to the Court that were allegedly showing some sort of mind set
23 of denial.

24 But what we didn't focus upon, was just what is it
25 that Leah Laferriere was owed as of January 4, 2005.

1 THE COURT: \$380,000.

2 MR. HIRSCH: That would be a little high, because it
3 was 318 they came back with.

4 THE COURT: Oh. Okay.

5 MR. HIRSCH: Okay?

6 THE COURT: 318, okay.

7 MR. HIRSCH: Because that's the question. I mean,
8 the question in all of these cases on failure to settle is, is
9 there some clear benchmark to which the insurer's got to reach
10 in order -- is there some amount clearly owed that the insurer
11 failed to pay? Okay?

12 And here we have a case that people evaluated quite
13 differently. And, in fact, despite the insistence by Mr.
14 Waldenberger that zero dollars were allocated for the shoulder,
15 Mr. Meehan wrote to his clients on January 24th, 2005, it's
16 Exhibit C to our initial moving papers, and he says:

17 "As we discussed, we had evaluated this matter in a
18 range of \$125,000 to \$150,000, without taking the deduction of
19 the tortfeasor's 50,000 in insurance coverage into account.
20 However, this was before the additional shoulder surgery. We
21 believe that this procedure probably adds another \$25,000 to
22 the case. As a result, we recommend valuing this matter in the
23 150 to \$175,000 range, with a net exposure to Nationwide/Zurich
24 of 100 to \$125,000. Any offer within that range would be a
25 fair and reasonable offer to Ms. Laferriere."

Hirsch - Argument

Page 38

1 Okay? The shoulder was considered.

2 THE COURT: And did you -- what offer did you make,
3 if you know.

4 MR. HIRSCH: The offer -- both of those offers were
5 made. First \$100,000, then \$125,000, by Mr. Meehan. And it
6 was declined.

7 And, furthermore, after the \$125,000 was offered,
8 there is evidence in the record that Mr. Meehan was told that
9 this case -- that the client wanted this case to go to
10 arbitration. And that it was going to go. And there was no
11 reason for Zurich to offer the amount that it had reserved,
12 which is a different thing at the beginning --

13 THE COURT: Right.

14 MR. HIRSCH: -- they reserved \$150,000. It wouldn't
15 be accepted. Now how much -- what science is there to tell us
16 now where between \$125,000 and \$375,000 this case should come
17 out at?

18 THE COURT: I think you ask the Kline & Specter firm.
19 They're knowledgeable in this deal.

20 MR. HIRSCH: Yes. So, overall, I would say, with
21 respect to the exhibit that was handed up to you, I would say
22 that, how does one calculate the amount of \$318,000?

23 Where does that come from? Only 20/20 hindsight,
24 which the Pennsylvania case law specifically has appealed, says
25 is not evidence of bad faith.

1 You can't use settlement offers and results as the
2 objective evaluation of a claim. It could just as easily have
3 come in in favor of Zurich and been \$100,000 instead of 125,000
4 -- or \$318,000.

5 I would also point out that, when we're talking about
6 harm here to Ms. Laferriere, this exhibit, and I think that
7 Your Honor's drift might have been going towards sort of BMW v.
8 Gore and progeny, where punitive damages have to, as a
9 constitutional matter bear some relationship to --

10 THE COURT: Right.

11 MR. HIRSCH: -- the compensatory loss. I would point
12 out here that, when we look at this exhibit and when we start
13 calculating what we're moving towards is a delay claim. Now
14 although --

15 THE COURT: Yes.

16 MR. HIRSCH: -- we start this process on January 4,
17 2005, no one knows what she's owed, at that point, or anytime
18 later. In fact, we're not even going to know what she might be
19 owed until May 24th, 2005, when the first arbitration hearing
20 was scheduled.

21 So now we're in the time period between May and
22 October of 2005. We have two continuances. One is to help
23 plaintiff seal up the hole in their case by getting consent
24 from Dr. Grossinger, or getting a supplemental report. And
25 another's due to Mr. Meehan's objection about using a

Hirsch - Argument

Page 40

1 supplemental report, and to give him a chance to get one
2 himself.

3 Because, although it was touted to you that Dr.
4 Bosacco changed his opinion and was so suspect, well Dr.
5 Hummer, plaintiff's physician, Dr. Hummer was the one who wrote
6 the note, and I quote:

7 "It is not clear to her or to me that the motor
8 vehicle accident was the cause of the shoulder pain, but the
9 onset was temporally related."

10 Now he wrote that note back in 2001, I believe, and
11 then, in 2005, he changed his opinion after getting a couple of
12 letters from the plaintiff's UIM lawyer, which I haven't seen,
13 because no one can look at those letters.

14 So he changed his opinion, too.

15 THE COURT: You're suggesting those letters included
16 a check?

17 MR. HIRSCH: I think one of them did. But not enough
18 to make a difference. That's not exactly what we were talking
19 about, but --

20 THE COURT: Okay.

21 MR. HIRSCH: -- I think Your Honor's correct. So we
22 had two -- two doctors juxtaposed, who gave differing opinions,
23 if you believe that what Mr. Waldenberger has characterized as
24 a suspect opinion by Dr. Bosacco. We have an equally suspect
25 opinion by Dr. Hummer.

1 And they're put before the arbitrators and they make
2 their award. Then we're right back smack in the middle of
3 litigation.

4 That's what litigation is for. It's not what bad
5 faith -- it's not bad faith conduct to conduct an aggressive
6 defense. I mean, we get -- and, indeed, you know, there -- the
7 insurance company's obligations here, you know, Zurich's
8 obligations here -- Zurich's being sued, because they were
9 protecting, first, a \$250,000 deductible by Nationwide.

10 And, second, Zurich. So to say that Zurich's acting
11 solely in its own interest, is incorrect.

12 THE COURT: Wait a minute, you lost me on that what
13 was --

14 MR. HIRSCH: Okay. This Nationwide -- the Nationwide
15 Mutual Insurance Company was the named insured. Ms. Laferriere
16 was an employee of Nationwide Mutual Insurance Company. And
17 that is how she was entitled to coverage.

18 THE COURT: Well what's this 250 --

19 MR. HIRSCH: The Nationwide policy has a \$250,000
20 deductible in it. So that Nationwide pays the first \$250,000
21 on any UIM claim. And Zurich only thereafter. So in defending
22 this arbitration case, Zurich is not acting solely in its own
23 interest, but also in the interest of Nationwide.

24 Which is on the hook for the first \$250,000 here. So
25 this is not a case of solely self interest.

Hirsch - Argument

Page 42

1 THE COURT: So that, basically, the plaintiff, her
2 UIM claim was against her employer.

3 MR. HIRSCH: That's correct.

4 THE COURT: That's strange.

5 MR. HIRSCH: For the first \$250,000, it certainly
6 was.

7 THE COURT: And how does that tie in with workers'
8 compensation laws?

9 MR. HIRSCH: I think we're once removed, because of
10 the interposition of zurich there.

11 But, you know, we hear these sound bites, you know,
12 we hear the little sound bites, like that Dr. Bosacco's opinion
13 was fine with us.

14 Well it's fine with us, because in this context,
15 where she has to prove what she's legally entitled to as
16 compensatory damages, it's not Zurich's burden of proof to show
17 causation, it's her's.

18 And, you know, we come to another little vignette
19 here about how Mr. Meehan contacted Dr. Grossinger and said,
20 I'd prefer you don't give your consent.

21 Well are we to then be in a position here to be
22 subject to punitive damages because, in the contested
23 arbitration, our counsel contacted his expert witness?

24 THE COURT: Just a matter of curiosity, was Mr.
25 Meehan an employee or a --

1 MR. HIRSCH: Mr. Meehan was an associate of the law
2 firm of Rawle & Henderson. And I would dispute highly Mr.
3 Waldenberger's characterization that in all instances Mr.
4 Meehan is considered to be the agent of the insured.

5 THE COURT: Well regardless of that --

6 MR. HIRSCH: Pardon me?

7 THE COURT: -- have you suggested that Mr. Meehan
8 should contact his own liability insurer?

9 MR. HIRSCH: No one has suggested that. And Mr.
10 Meehan will be a witness in this case.

11 THE COURT: Well --

12 MR. HIRSCH: And -- but I would point out to the
13 Court that this is not -- that there is an independent
14 contractor issue here, too, on whether or not Mr. Meehan, you
15 know, that Zurich is totally responsible for it, all the
16 conduct.

17 One of the materials that plaintiff cited here was a
18 PaTLA brief on amicus curiae case. But if you go to the
19 underlying case, which is Harleysville Insurance v. --
20 Ravendran v. Harleyville Insurance, which is found at 2002
21 Westlaw 32516203.

22 You will see that the trial court opinion in that
23 case, which was subsequently affirmed, addresses this issue and
24 says that an attorney -- well as a general proposition can be
25 an agent, they can also be an independent contractor hired by

1 the insurance company. And, therefore, any conduct by the
2 attorney cannot be imputed to the client.

3 So if there is some evidence that the Zurich
4 personnel is directing these particular things, and there's not
5 in all cases, such evidence. But that I think is more --

6 THE COURT: So that --

7 MR. HIRSCH: -- of an issue for trial, because I
8 wanted to come back to --

9 THE COURT: Your argument is that, all an insurance
10 company has to do to avoid bad faith claim, is to make sure
11 that all the bad faith was exercised by their hired attorney?

12 MR. HIRSCH: Well that would be a little extreme,
13 Your Honor. And I think that's exactly what the situation was
14 in Klinger where the insurance carriers tried to blame its
15 counsel for all these activities, and says we're not
16 responsible for him.

17 Okay? I mean, that's not the case here. But to
18 argue as a general proposition an agency theory that the
19 insurer can be liable for any conduct, I think is incorrect.

20 Your Honor asked about this issue, again, of punitive
21 damages and some of the facts of the cases involved. Well, you
22 know, the case that stands out to me in this situation, we have
23 Hollock v. Erie, and that was a large punitive damage award.

24 But let's look at what the offer was. The offer of
25 settlement was 29 times less than the arbitration award. The

Hirsch - Argument

Page 45

1 arbitrators awarded \$865,000. It was 29 times less. It bore
2 no relationship --

3 THE COURT: My primary school mathematics --

4 MR. HIRSCH: I think it's about -- is it about
5 \$30,000?

6 THE COURT: -- is a little bit rusty. But --

7 MR. HIRSCH: I was looking in the opinion.

8 THE COURT: I have trouble thinking of anything as
9 being so many times less. You're saying it's one twenty-ninth
10 of?

11 MR. HIRSCH: Yes. I think it was something like --

12 THE COURT: It's not 29 times less.

13 MR. HIRSCH: -- \$30,000. And, you know, they had --
14 the insurance carrier in that case had in front of it, you
15 know, that was less than the medical expenses, than the unpaid
16 medical expenses. They had wage loss projection of over
17 \$100,000 in front of them.

18 It was -- it bore no reasonable relationship to the
19 claim at issue. Okay? And if we look at Hollock, we also need
20 to look at what happened when Hollock went from the Superior
21 Court to the Supreme Court.

22 And although --

23 THE COURT: What did happen?

24 MR. HIRSCH: -- and although it was dismissed as
25 improvident, Justice Cappy, joined by Justice Castille issued

1 an opinion in which, when one reads it, we're doing a little
2 Erie predictive analysis here.

3 When one reads that opinion, it comes across as
4 pretty clearly that, at least two justices, one's still
5 sitting, I believe that Section 8371 is not intended to reach
6 litigation conduct.

7 Okay. We've cited that opinion in our brief and we
8 recommend it to -- because the trend here is to shrink the
9 application of the statute. Indeed, in one last case, that was
10 not cited in the briefs, this is the Third Circuit case UPMC
11 Health System v. Metropolitan Life, it's found at 391 F.3d 497.

12 In that case --

13 THE COURT: Well why isn't it in your brief, if it's
14 all that important?

15 MR. HIRSCH: Well, you know, it was not all that
16 important, it's just that we're moving so far away from what
17 the statute, I thought, was intended to address. And also
18 we're moving into the realm of a delay claim, which really
19 wasn't raised here, in response to this motion for summary
20 judgment.

21 I mean, we didn't have a situation -- we want to
22 address it. I raised it initially, and I said that Mr.
23 Goldberg, you know, gave his opinion that this did not take an
24 inordinately amount -- long amount of time.

25 There were delays on both sides here. And, you know,

1 that's just not sufficient. So but in UMPC Health System
2 (sic), the Third Circuit was confronted with a case where
3 conduct was alleged where the insurance carrier was supposedly,
4 through a violation of the Unfair Insurances Practices Act,
5 trying to obtain additional premiums from the insured. And the
6 question was raised whether this would not be bad faith conduct
7 under Section 8371.

8 The Third Circuit says that, you know, the activity
9 has to result from some denial of benefits to be within the Bad
10 Faith Statute. Under the definitions in Terletsky and other
11 cases following.

12 And now other -- some cases have recognized that, you
13 know, the sort of the justice delayed, is justice denied
14 theory, and recognized that, in the long periods of time
15 elapsing because of undue conduct by the insurer --

16 THE COURT: Well you denied him the difference
17 between what the arbitrators awarded and what your offer was,
18 right?

19 MR. HIRSCH: If one could predict that, as of January
20 4th, 2005, or as of May 24th, 2005 --

21 THE COURT: We can predict it easily now, what the
22 amount is.

23 MR. HIRSCH: We certainly can. Which is why it's
24 incompetent as evidence of bad faith standing alone.

25 THE COURT: Okay. Far be it from me to cut everybody

Page 48

1 short, but I think I've heard all I want to hear. I am totally
2 amazed at how much effort you gentlemen have put into this
3 case, just judging by the paperwork alone.

4 I will, of course, take it under advisement and
5 render a superb decision, which probably neither side will
6 like.

7 I will, however, give you the benefit of my current
8 thinking, which is that the one possible element that might
9 warrant a bad faith award is the trying to shut out the medical
10 opinion of the defendant's own doctor.

11 My suggestion is that the damages sustained by the
12 plaintiff are minimal, and that the punitive award, if any,
13 would be somewhat -- would be extremely moderate, would have to
14 be in order to past muster at all.

15 And I'm not sure that counsel fees or the
16 expenditure, based on the paperwork involved, whether the case
17 warranted that kind of attorney effort.

18 To make a long story short, what I'm going to suggest
19 is the following. I'm going to recess for 10 minutes and
20 direct counsel to explore vigorously the possibility of
21 settling this case on some modest basis, which will avoid
22 further wasted effort on both sides.

23 MR. WALDENBERGER: Your Honor, to the extent that
24 it's important to you, we have a mediation scheduled for this
25 Friday.

1 THE COURT: Pardon?

2 MR. WALDENBERGER: We have a mediation scheduled for
3 this Friday.

4 THE COURT: Oh, before whom?

5 MR. WALDENBERGER: Before Tom Rudder of ADR Options.

10 Recess until further notice.

11 (Court adjourned)

* * * *

C E R T I F I C A T I O N

14 I, Josette Jones, court approved transcriber, certify that the
15 foregoing is a correct transcript from the official electronic
16 sound recording of the proceedings in the above-entitled
17 matter.

18

19

20

JOSETTE JONES

DATE

21

DOMAN TRANSCRIBING